

**Discharge by Declaration:
What Chapter 13 Lawyers Can Learn From Chapter 11**

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I. Introduction

Chapter 11 and Chapter 13 share many similarities in text and structure. Developments under one chapter are likely to influence cases under the other. This term the Supreme Court will consider “discharge by declaration” in *Espinosa v. United Student Aid Funds, Inc.*, 545 F.3d 1113, *as amended by*, 553 F.3d 1193 (9th Cir. 2008), *cert. granted*, 2009 U.S. LEXIS 4361 (2009). The case illustrates the tension between finality and form as the competing principles of res judicata and due process conflict. Chapter 11 has a substantial body of case law dealing with the binding effect of a confirmed plan which may guide the Supreme Court’s deliberations.

II. Res Judicata

Chapter 11 cases can involve millions or even billions of dollars in assets and claims. Chapter 13 cases, on the other hand, are subject to strict debt limits. While chapter 11 plans feature hundreds of pages of dense legalese, chapter 13 involves large numbers of cases with relatively short plans. Regardless of the chapter, creditors must wade through large amounts of paper to ensure that their rights are protected.

In Chapter 11, there has been a lively debate over whether a plan may release or enjoin actions against non-debtors. *In re Continental Airlines*, 203 F.3d 203 (2nd Cir. 2000)(discharge of non-debtors not allowed absent unusual circumstances); *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2nd Cir. 2005)(non-debtor release only allowed when “important to a debtor’s plan”); *In re Dow Corning Corporation*, 280 F.3d 648 (6th Cir. 2002)(non-debtor release only appropriate in “unusual circumstances”); *In re Ingersoll, Inc.*, 562 F.3d 856 (7th Cir. 2009)(limited release allowed when essential component of plan); *Matter of Specialty Equipment Companies, Inc.*, 3 F.3d 1043 (7th Cir. 1993)(consensual release permissible); *In re Lowenschuss*, 67 F.3d 1394 (9th Cir.

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1995)(bankruptcy court lacks power to confirm plan which discharges non-debtor). In Chapter 13, there is a controversy over “discharge by declaration” where a plan declares that a debt, such as a student loan, will be found to be discharged. *In re Banks*, 299 F.3d 296 (4th Cir. 2002)(no discharge by declaration); *In re Ruehle*, 412 F.3d 679 (6th Cir. 2005)(same); *In re Hanson*, 397 F.3d 482 (7th Cir. 2005)(same); *Espinosa v. Student Aid Funds, supra* (discharge by declaration permissible when not challenged); *In re Meersman*, 505 F.3d 1033 (10th Cir. 2007)(no discharge by declaration). While these strategies may fail if challenged at the confirmation hearing, they are sometimes overlooked. When they are discovered after the confirmation order has become final, res judicata will determine whether the order stands.

The doctrine of res judicata prevents a party from re-litigating a matter which has been previously decided. As the Supreme Court stated in a case involving release of a guarantor in a reorganization proceeding under the Bankruptcy Act:

Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

Stoll v. Gottlieb, 305 U.S. 165, 172, 59 S. Ct. 134, 138, 83 L. Ed. 104, 109 (1938).

The elements necessary to invoke res judicata have been described as follows:

First, the prior judgment must be valid in that it was rendered by a court of competent jurisdiction and in accordance with the requirements of due process. Second, the judgment must be final and on the merits. Third, there must be identity of both parties or their privies. Fourth, the later proceeding must involve the same cause of action as involved in the earlier proceeding.

In re Justice Oaks II, Ltd., 898 F.2d 1544, 1550 (11th Cir. 1990).

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There is little dispute that chapter 11 and chapter 13 confirmation orders meet the second, third and fourth elements for res judicata. Confirmation orders have uniformly been found to be final judgments entitled to res judicata effect. *Stoll v. Gottlieb, supra; In re Optical Technologies, Inc.*, 425 F.3d 1294 (11th Cir. 2005). One who participates in a confirmation hearing or has the right to participate is considered to be a named party for res judicata purposes. *In re Justice Oaks II, supra* (“one who participates in a chapter 11 plan confirmation proceeding becomes a party to that proceeding even if never formally named as such”); *Corbett v. McDonald Moving Services, Inc.*, 124 F.3d 82 (2nd Cir. 1997) (“all persons present and having an opportunity to challenge the bankruptcy court’s jurisdiction to approve or implement each component of the plan must raise subject matter jurisdiction at that time or on direct appeal or not at all”). Whether a proceeding involves the same cause of action depends on the specificity of the plan. Compare *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987)(order made it “indisputably clear” that guaranty was released by plan) with *Matter of Applewood Chair Company*, 203 F.3d 914 (5th Cir. 2000)(release of officers, shareholders and directors was not sufficiently specific to encompass guarantors even when guarantors were also officers, directors and shareholders).

Most of the case law focuses upon the first element: a court of competent jurisdiction and in accordance with the requirements of due process. As will be discussed below, the Supreme Court has effectively foreclosed collateral attacks upon the subject matter jurisdiction of a bankruptcy court to render a confirmation order. However, the requirement of due process in the confirmation context remains the subject of debate.

III. Subject Matter Jurisdiction

Subject matter jurisdiction refers to the court's authority within a specific area or to grant a specific type of relief. When a litigant claims that a court lacked authority to enjoin actions against non-debtors or to discharge student loan claims pursuant to a plan, it is making an objection to subject matter jurisdiction.

As far back as 1938, the Supreme Court held that while a court has no power to expand its jurisdiction, the very fact of entering a judgment constitutes a finding by the court that it had subject matter jurisdiction. If this finding of jurisdiction is not challenged on direct appeal, it cannot be attacked collaterally.

A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators. There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court. Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter. When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is *res judicata*. After a federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation.

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Stoll v. Gottlieb, 305 U.S. at 171-72. This proposition has been confirmed by subsequent Supreme Court cases in the bankruptcy field. *Travelers Indemnity Company v. Bailey*, *supra*; *Kontrick v. Ryan*, 540 U.S. 443 (2004).

The Supreme Court has drawn a distinction between jurisdictional facts which may be challenged collaterally and those which may not. In *Stoll v. Gottlieb*, the Supreme Court stated:

It is frequently said that there are certain strictly jurisdictional facts, the existence of which is essential to the validity of proceedings and the absence of which renders the act of the court a nullity. . . . For instance, service of process in a common law action within a state, publication of notice in strict form in proceedings *in rem* against absent defendants, the appointment of an administrator for a living person, a court martial of a civilian. Upon the other hand there are quasi-jurisdictional facts, diversity of citizenship, majority of litigants, and jurisdiction of parties, a mere finding of which, regardless of actual existence, is sufficient. As to the first group it is said an adjudication may be collaterally attacked, as to the second it may not. We do not review these cases as we base our conclusion here on the fact that in an actual controversy the question of the jurisdiction over the subject matter was raised and determined adversely to the respondent. That determination is *res adjudicata* of that issue in this action, whether or not power to deal with the particular subject matter was strictly or quasi-jurisdictional.

Stoll v. Gottlieb, 305 U.S. at 176-77.

In the recent *Travelers Indemnity Co.* case, the Supreme Court noted three narrow instances in which subject matter jurisdiction may be collaterally attacked.

(1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or

(2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or

(3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment.

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should have opportunity belatedly to attack the court's subject matter jurisdiction.

Travelers Indemnity Co. v. Bailey, 129 S.Ct. at 2206, 174 L.Ed.2d at 111.

The case law is nearly uniform in rejecting collateral attacks upon the power of a bankruptcy court to release a non-debtor or enjoin an action against a non-debtor pursuant to a plan of reorganization. *Travelers Indemnity Co. v. Bailey, supra* (confirmation order which enjoined all actions against insurance companies, including actions based upon their own misfeasance could not be collaterally attacked); *Stoll v. Gottlieb, supra*; *Monarch Life Insurance Company v. Ropes & Gray*, 65 F.3d 973 (1st Cir. 1995)(injunction against actions against the debtors and their attorneys precluded debtor from suing its attorneys and could not be collaterally attacked); *Corbett v. McDonald Moving Services, Inc.*, 124 F.3d 82 (2nd Cir. 1997)(plan which discharged debtor's parent company could not be collaterally attacked); *FOM Puerto Rico SE v. Dr. Barnes Eyecenter, Inc.*, 255 Fed.Appx. 909 (5th Cir. 2007)(release of guarantor could not be collaterally attacked); *Republic Supply Co. v. Shoaf, supra* (release of guarantor could not be collaterally attacked); *Trulis v. Barton*, 107 F.3d 685 (9th Cir. 1995)(plan which discharged country club's founders, directors and attorneys could not be collaterally attacked).

While releases of non-debtors may be controversial, they must be challenged on direct appeal. "The point is that only a direct attack is available and collateral attack is unavailable." *Trulis v. Barton*, 107 F.3d at 691, quoting 5 Collier on Bankruptcy Pra. 1141.01[1](Lawrence P. King, ed., 15th Ed. 1995).

IV. Due Process

On the other hand, courts have not been reluctant to allow collateral attacks based upon lack of due process. In *Travelers Indemnity Co. v. Bailey*, the Supreme Court noted that it did not

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reach the issue of due process and remanded the case back to the Court of Appeals for a finding on this subject. In *Stoll v. Gottlieb*, the Supreme Court distinguished between facts that were strictly jurisdictional and those which were quasi-jurisdictional. Among the strictly jurisdictional facts was service with process, which is one facet of due process.

Since due process may be challenged in a collateral attack, the question is what process is due? Is it enough to bury the proposed treatment of a claim in a plan and hope that the creditor does not catch on? Does Due Process require complete compliance with procedural rules? In what cases does Due Process even require actual notice?

The leading Supreme Court case on due process is *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950), where the Supreme Court stated:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (citation omitted). The notice must be of such nature as reasonably to convey the required information (citation omitted), and it must afford a reasonable time for those interested to make their appearance, (citations omitted). But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." (citations omitted).

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected (citations omitted) or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

339 U.S. at 314-15, 70 S. Ct. at 657-58, 94 L. Ed. at 873-74.

As a general rule, due process in the bankruptcy context has two main rules: (1) the claimant must receive notice of the pendency of an action affecting his rights; and (2) the notice

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must allow sufficient time to permit the claimant to present his objections. *In re Kendavis Holding Company*, 249 F.3d 385 (5th Cir. 2001). However, even these rules have exceptions. While actual notice must be given to a known pre-petition creditor, *In re Arch Wireless, Inc.*, 534 F.3d 76 (1st Cir. 2008), a post-petition creditor must merely have knowledge of the case, *In re Sequa Corp.*, 28 F.3d 512 (5th Cir. 1994). In other instances, “an ordinarily valid form of notice may fail to satisfy due process because of the circumstances of the defendant.” *In re Kendavis Holding Company*, at 387.

The starting point for analyzing due process claims is the procedural rules. The Bankruptcy Rules provide five types of notice which must be provided to creditors in a chapter 11 case:

The Bankruptcy Rules specify that known creditors must receive: (1) notice of deadlines for filing proofs of claims (bar date), *Fed. R. Bankr. 2002(a)(7)*; (2) a copy of the reorganization plan, *Fed. R. Bankr. 3017(d)*; (3) notice of the confirmation hearing, *Fed. R. Bankr. 3017(d)*; and (5) the confirmation order, *Fed. R. Bankr. 2002(f)*.

In re Arch Wireless, Inc., at 82. Generally, notice provided under these rules will be notice “reasonably calculated to reach interested parties” and will satisfy the requirements of due process. *In re Longardner & Associates, Inc.*, 855 F.2d 455 (7th Cir. 1988); *In re Optical Technologies, Inc.*, *supra*.

Several cases help to flesh out when notice in connection with a chapter 11 plan will be adequate. *Kendavis Holding Company* involved a former employee covered by the company’s pension plan. He did not have a pre-petition claim. As a result, due process did not require that he receive actual notice. During the case, Kendavis terminated its pension plan so that it could use the money to fund its reorganization plan. It sent a letter to pension beneficiaries informing them of the

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termination, but assuring them that their benefits would not be affected. Subsequently, it confirmed a plan which discharged all claims arising prior to the effective date and enjoined pursuit of such claims. Ten years later, when the former employee learned that his pension benefits were gone, he filed suit. The bankruptcy court held him in contempt for violating the company's discharge. Thus, he not only lost his pension, but was ordered to pay \$40,000 to the debtor.

The Fifth Circuit rejected the argument that mere knowledge of the case was adequate to satisfy due process. It held:

Due process requires, at the very least, a debtor to refrain from assuring potential claimants that their rights will not be adversely affected during bankruptcy proceedings. This is especially true when the debtor is a large corporation who owes a fiduciary duty to the individual claimant. Although *Kendavis* may not have harbored any deceptive intent by assuring Christopher that his rights would not be affected, "fundamental notions of fairness and due process" dictate that we not place the burden on Christopher to come forward with his claim. (citation omitted). Before he was deprived of his claim for pension benefits, Christopher was entitled to notice that would reasonably apprise him "of the pendency of the action and afford [him] the opportunity to present [his] objections." (citation omitted). In these limited circumstances, perfunctory knowledge of the bankruptcy proceeding did not constitute adequate notice to satisfy constitutional due process requirements.

Kendavis Holding Company, at 388. Thus, notice which is misleading is worse than no notice at all.

Three cases dealing with non-debtor releases illustrate the principle that the more specific the notice the more likely it will be enforceable. *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987), *Matter of Applewood Chair Company*, 203 F.3d 914 (5th Cir. 2000) and *FOM Puerto Rico SE v. Dr. Barnes Eyecenter, Inc.*, 255 Fed.Appx. 909 (5th Cir. 2007) are each Fifth Circuit cases dealing with the enforceability of non-debtor releases contained within plans which

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were not objected to or appealed. Although due process was not expressly addressed in any of the cases, the specificity of the plan language was.

In *Shoaf*, the widow of one of the company’s founders agreed to contribute money from her husband’s insurance policy to fund the debtor’s plan on condition that he be released from all liability. Another guarantor agreed to release his claims against the company in return for a release of guarantor liability. The plan included a provision that “[The] release shall include the release of any guarantees given to any creditor of the debtor which guarantees arose out of the debtor’s business dealings with any creditor of the debtor. . . .” Later, a creditor (who was also the chairman of the creditor’s committee) filed suit on a guarantee. The Fifth Circuit found that the release provision was “indisputably clear” and that the creditor had waived its right to protest when it did not appeal the confirmation order.

In *Applewood Chair Company*, the debtor confirmed a plan which stated:

The provisions of the confirmed plan shall bind all creditors and parties in interest, whether or not they accept the plan and shall discharge the Debtor, its officers, shareholders and directors from all claims that arose prior to Confirmation.

When a creditor filed suit on guarantees given by the company’s principals, who were also officers and shareholders, they claimed that they had been discharged by the Plan. The Fifth Circuit disagreed. It stated that, “The lack of a specific discharge distinguishes this situation from that in *Shoaf* and thus, does not warrant the application of its holding as appellants assert.” *Applewood*, at 919.

Finally, in *Dr. Barnes Eyecenters*¹, the debtor’s plan provided for subordination of claims held by insiders. In return for this subordination, the plan provided:

¹ While *Dr. Barnes Eyecenters* is an unpublished opinion, and therefore not of precedential value, it has received much attention from courts and commentators.

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In return for the subordination of their claims, Debtor's insiders shall not have or incur any liability to any person for any claim, obligation, right, cause of action or liability, whether known or unknown, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, or occurrence from the beginning of time through the Effective Date in any way relating to DBEI, its Bankruptcy Case, or the Plan; and all claims based upon or arising out of such actions or omissions shall be forever waived and released.

Dr. Barnes Eyecenter, at 3-4. The plan was confirmed without objection. When the inevitable suit against the guarantors followed, the Fifth Circuit found that the language was specific enough to be enforceable.

The language in this case falls somewhere between *Shoaf* and *Applewood Chair* with respect to the specificity of the release; however, several factors cause us to conclude that the bankruptcy release does bar FOM Puerto Rico's claims. First, as in *Shoaf*, the release of claims was an integral part of the bankruptcy order. As stated in Section 5.03 of the Plan, Eyemart agreed to subordinate all of its claims against DBEI to those of other creditors "[i]n return" for the release of all claims against Eyemart. Further, at the hearing before the bankruptcy court regarding the confirmation of the Plan, counsel specifically noted that Eyemart received the release in consideration for its agreement to subordinate its claims. Thus, the release of claims was not simply boilerplate language that was inserted into the Plan, but rather a necessary part of the Plan itself.

Dr. Barnes Eyecenter, Inc., at 8-9. Thus, the Fifth Circuit found that language which was less specific could still be enforced where was "not simply boilerplate" and was "a necessary part of the Plan itself."

The lesson to be drawn from this trio of cases is that language which is specific and material will be more likely to be enforced than language which is vague and gratuitous. The due process implication for these cases is that plans which are clear are more likely to place creditors on notice. Additionally, provisions which are "not simply boilerplate" are likely to place creditors on notice and thus satisfy due process.

The final chapter 11 case illustrating plan provisions enforceable or not is *Matter of Taylor*, 132 F.3d 256 (5th Cir. 1998). This case is perhaps closest to the "discharge by

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declaration” cases and most frustrating in its analysis. In *Taylor*, the debtor was an individual who was also a principal of a company which was delinquent upon its payroll taxes. In his schedules, he listed a debt for “unassessed potential 941 penalty—corporate taxes” in the amount of \$80,000. He listed the claim as contingent, disputed and unliquidated. The IRS filed a proof of claim for personal income taxes, but later withdrew the claim after concluding an audit. Had the debtor done nothing further, the potential liability for trust fund taxes would have been non-dischargeable and would not have been affected by the bankruptcy. *Matter of Fein*, 22 F.3d 631 (5th Cir. 1994)(IRS could assess personal trust fund penalty post-discharge despite failure to file claim because debt was non-dischargeable). However, in his plan, he created a class for priority tax claims and provided that, “Pursuant to 11 U.S.C. Sec. 505, Debtor is not indebted for any claims in this class. All such claims, whether or not now asserted, are discharged without receiving payment.” The IRS did not object to the plan and the plan was confirmed.

Subsequently, the IRS assessed the debtor with liability in the amount of \$96,251.15 for trust fund taxes. The Fifth Circuit refused to apply res judicata, finding that the case fell within a “limited” exception to res judicata developed in chapter 13 cases. In *In re Simmons*, 765 F.2d 547 (5th Cir. 1985) and *In re Howard*, 972 F.2d 639 (5th Cir. 1992), the Fifth Circuit ruled that res judicata would not apply to a chapter 13 plan which attempted to treat a secured claim as unsecured or to “compromise” a secured claim. The Fifth Circuit relied upon the notion that a secured creditor is entitled to preserve its lien without participating in the bankruptcy case and that an objection to claim was necessary to challenge a secured claim in a chapter 13

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case. The Fifth Circuit stated that a claims objection initiated a contested matter under Rule 9014, while a plan did not.

The Fifth Circuit found that the considerations present in *Howard* and *Simmons* applied to determination of a tax claim in chapter 11 as well.

The same policies that weigh against a debtor relying upon a confirmed plan of reorganization to compromise a secured debt weigh in with equal force in the context of a § 6672 tax penalty. First and most important, the IRS has the option to remain outside the bankruptcy proceeding and preserve a debt for a § 6672 penalty without filing a claim in Chapter 11. . . .

Second, the normal procedure to determine the amount of a tax debt is for the debtor (or the IRS) to file a motion requesting that the bankruptcy court make the determination under 11 U.S.C. § 505.(citation omitted). Section 505 authorizes the court to determine "the amount or legality of any tax . . . whether or not previously assessed." (citation omitted) This determination should be made under Rule 9014, which governs contested matters, because it does not fall within adversary proceedings as delineated by Rule 7001. (citation omitted). Under Rule 9014, "relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought." (citation omitted). The motion should state with particularity the grounds and the relief desired. (citation omitted). Alternatively, the debtor can file a proof of claim on behalf of the IRS and object to it, in order to dispute the § 6672 penalty. (citation omitted).

The *Simmons* line of cases has held that, in the context of a secured claim, a confirmed plan does not substitute for an objection to a proof of claim. (citation omitted). Filing a § 505 motion institutes a contested matter which puts the parties on notice that litigation is required to resolve a dispute as to the amount of the debt, which, as we held in *Simmons*, the filing of a plan does not do in relation to a particular debt. (citation omitted). Similarly, the confirmation of a plan does not substitute for a § 505 motion any more than it substitutes for an objection to a proof of claim. (citation omitted).

Taylor failed to invoke the power of the bankruptcy court to determine the amount of the Marshall Mill § 6672 penalty. He did not file a proof of claim on behalf of the IRS or file a motion under § 505, one of which is necessary to compromise a nondischargeable debt. Taylor's listing of the debt in his schedules, disclosure statement, and Plan along with the recitation "Pursuant to § 505" did not invoke in any way the tax determination process. This mere recitation of the authority of § 505 does not make a plan confirmation hearing something that it is not; following the *Simmons* line of cases, we require an objection to a proof of claim or a § 505 motion to determine the amount of a tax debt. This burden is

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minor and no greater than the filing of a tax return required of all taxpayers. Therefore, Taylor's Plan is not res judicata as to the amount of his liability on the Marshall Mill § 6672 penalty, and the IRS is not barred from proceeding against him to collect that penalty.

Taylor, at 261-62.

The difficulty with the *Simmons/Howard/Taylor* line of cases is that they do not make any attempt to fit within traditional res judicata analysis. They simply state that res judicata does not apply because a different procedure should have been followed. The argument that the bankruptcy court lacks the power to modify a secured debt or a tax claim in a plan sounds suspiciously like an argument that the court lacks subject matter jurisdiction, which is clearly not an exception to res judicata.

The argument that a different procedure should have been followed sounds like a claim regarding due process. However, the argument elevates form over substance. The Bankruptcy Rules state that an objection to a plan, an objection to a claim and a motion to determine tax liability are all contested matters. This does not mean that the plan itself fails to initiate a contested matter. A chapter 11 plan is the ultimate contested matter. It can initiate the restructuring of billions of dollars in liabilities and affect hundreds of thousands of persons. While a chapter 13 plan has a more modest scope, it still has the power to restructure the relations between the debtor and his creditors on a fundamental basis. In bankruptcy, every matter is either a contested matter or an adversary proceeding. Plans do not fall within a third category of ministerial orders not giving rise to res judicata. If that were the case, creditors would be free to ignore plans completely.

Instead, the analysis should be whether the creditor was given notice that its rights were subject to being modified and whether it was given a sufficient time to object. As

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a general matter, the very nature of a chapter 11 or chapter 13 plan gives notice to creditors that their rights are subject to being modified. Additionally, the rules provide for an adequate period in which to object. Therefore, the issue should be whether the notice which was provided was adequate under the circumstances. To the extent that *Taylor* is not simply wrong, it could be seen as akin to *Applewood Chair Company*, where the plan was not sufficiently clear to meet the requirements of due process.

The cases dealing with due process in chapter 11 cases can be seen as standing for the following principles:

- 1) Due process requires notice of the pendency of an action which modify the creditor's rights and adequate time to object;
- 2) Due process requires actual notice to a known pre-petition creditor;
- 3) Due process requires that notice be sufficiently specific to understand how its rights will be affected;
- 4) Due process is violated by notice which obscures the relief being sought or the threat to the creditor; and
- 5) Compliance with applicable procedural rules will usually satisfy due process, although failure to comply with procedural rules will not necessarily violate due process.

V. How Closely Should Chapter 13 Follow Chapter 11 Cases?

Chapter 11 and chapter 13 both have at their core the restructuring of the debtor-creditor relationship. Both chapters allow a plan to "include any other appropriate provision not inconsistent with the applicable provisions of this title." 11 U.S.C. §§1123(b)(6), 1322(b)(11). Confirmation orders under each chapter are entitled to res judicata effect. As

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a result, it is not unreasonable to expect that res judicata decisions under chapter 11 would be useful in determining the effect of a chapter 13 confirmation order. Specifically, failure to object to or appeal a plan under chapter 11 or chapter 13 should foreclose an argument based upon subject matter jurisdiction, leaving only the challenge for due process.

However, on a functional level, there are significant distinctions between the chapter 11 cases allowing non-debtor releases and the chapter 13 cases allowing “discharge by declaration.” As shown by cases such as *Shoaf*, a non-debtor release can be critical to the overall success of a plan and benefit creditors in general. On the other hand, a plan provision determining that a student loan should be discharged as a substantial hardship primarily affects the debtor and the student loan creditor, but does not affect the overall ability to propose a plan and thus to benefit the other creditors.

Further, a chapter 11 plan necessarily provides both more due process and less than a chapter 13 plan. In chapter 11, the fact that creditors must receive a disclosure statement, are allowed to vote upon a plan and have the protection of the absolute priority rule all provide more protection to creditors. On the other hand, the sheer density of many chapter 11 plans makes it easier to hide suspect language within the fine print. A special provision contained within a chapter 13 plan is more likely to stand out for a creditor willing to take the time to read the document.